Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

JOSEPH J. RASH,

Petitioner,

v.

JOANN H. RASH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, consistent with Article IV, Section I, of the United States Constitution and 28 U.S.C. § 1738, a final decree of divorce entered in one State, after the plaintiff complied with all of the requirements of the rendering State's jurisdictional statutes, and when such State's statutes comply with Federal due process standards, should be given full faith and credit in a second State.

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Petitioner, Joseph J. Rash, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Rash v. Rash*, 173 F.3d 1376 (11th Cir. 1999) (App. A). The prior opinion of the Eleventh Circuit concerning this matter is reported at *Rash v. Rash*, 147 F.3d 1291 (11th Cir. 1998). The opinion of the United States District Court for the Middle District of Florida (Hon. Elizabeth A. Kovachevich, J.), is reported at *Rash v. Rash*, 960 F. Supp. 820 (M.D. Fla., March 6, 1997) (App. B).

STATEMENT OF JURISDICTION

The first judgment of the United States Court of Appeals for the Eleventh Circuit was entered on July 27, 1998. A Suggestion for Rehearing *En Banc* was filed. The original panel reconsidered the matter and issued a new opinion on April 20, 1999, and vacated its original opinion. The Appellant then filed a second Suggestion for Rehearing *En Banc*, and the United States Court of Appeals for the Eleventh Circuit denied it on July 27, 1999 (App. C).

This Court has jurisdiction to review the Eleventh Circuit's decision pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section I of the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."

Section 1738 of Title 28 of the United States Code provides, in pertinent part: Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

This case involves a situation where the husband and wife filed and pursued two different dissolution of marriage actions. The husband filed a petition for dissolution of marriage in Florida, and, after receiving service of process, subsequently the wife filed a divorce action in New Jersey. The husband complied with all of the requirements of Florida's jurisdictional statutes and Florida was the marital domicile at the time that the husband filed his action. Despite the husband's full compliance with all of the requirements of Florida's statutes in acquiring *in personam* jurisdiction over the wife, and despite a finding by the Florida court that it had *in personam* jurisdiction of the wife, the New Jersey court subsequently refused to give full faith and credit to the prior Florida judgment of dissolution of marriage.

A. Background

Joseph J. Rash and Joann H. Rash were married on February 10, 1968, in Philadelphia, Pennsylvania. In October of 1992, the Rashes moved to Florida with intentions of permanently residing there. They purchased a mobile home, had it redecorated because that was their retirement home. When they moved to Florida, the Rashes, sometime in April, 1993, listed their former home located in New Jersey with a real estate broker to sell it. Sometime in February 1993, each of the parties obtained Florida identification cards, which are issued by the State and are like Florida driver's licenses, except that they are not a driver's license.

On February 25, 1994, Joseph Rash began divorce proceedings against Joann Rash in Hernando County, Florida. Joann Rash was personally served with Mr. Rash's verified petition for dissolution of marriage and a summons on March 14, 1994, pursuant to Florida Statutes §§ 48.193 and 48.194, entitled "Personal Service Outside State". Mrs. Rash did not appear in the Florida case.

Mrs. Rash's response to the service of process served upon her was to file her own dissolution of marriage action on March 21, 1994 in Cape May County, New Jersey, despite the fact that the Florida court already had acquired *in personam* jurisdiction over her. The next day, Mrs. Rash filed an emergency application seeking that the New Jersey court restrain the husband from proceeding in Florida. A hearing was held on her motion on March 29, 1994, where Mr. Rash made a special appearance to contest jurisdiction over him. Mr. Rash had caught wind of the hearing but was never properly served with the New Jersey summons or petition for divorce. On March 31, 1994, the New Jersey court entered a *pendente lite* order restraining Mr. Rash from proceeding in the Florida divorce action. The March 31st order set the jurisdictional matter for a plenary hearing on May 10, 1994. Said hearing did not take place until December 9, 1994.

At the time that Mr. Rash filed his petition in Florida, he was registered to vote in Florida, had a Florida driver's license, a Florida library card, and the parties had a joint checking account in Florida. From about April of 1993, until Ms. Rash left Florida and moved back into the New Jersey house in January 1994, the New Jersey home had been on the market for sale through a listing with a real estate broker. The house did not sell, and due to marital problems, Mrs. Rash left Florida and moved back to New Jersey sometime in January 1994.

In an abundance of caution, Mr. Rash filed a motion in Florida, on July 8, 1994, for permission to proceed in the Florida action. The Florida court granted said motion. On October 21, 1994, seven months after Joann Rash had been personally and properly served with a summons and a copy of the verified Florida petition for dissolution of marriage, a default was entered against Joann Rash in the Florida divorce action and a final judgment of dissolution of marriage was entered.

The Florida court found that the husband had been a resident of Florida for six months next preceding the filing of his petition and that the court had jurisdiction of the parties and the subject matter. The Florida court specifically retained jurisdiction for purposes of enforcing all terms and provisions of its final judgment.

On December 9, 1994, the New Jersey court finally held the hearing on the issue of jurisdiction and again found that the Florida court had inappropriately asserted *in personam* jurisdiction over Joann Rash. On December 14, 1994 the New Jersey court entered another temporary order finding that Florida had inappropriately asserted *in personam* jurisdiction over the wife, that New Jersey had *in personam* jurisdiction over the parties, and that it was the appropriate forum to resolve those issues relating to distribution of property and support. On December 14, 1994, the Florida final judgment of dissolution of marriage was about seven weeks old and was at that time entitled to full faith and credit in New Jersey.

New Jersey's finding of *in personam* jurisdiction was inconsistent with the facts and New Jersey law. In January of 1994, when Mrs. Rash moved back to New Jersey, she had been back in the state less than eight weeks when she filed her petition for dissolution of marriage, with, according to her, the intention of being domiciled in New Jersey. Eight weeks' residency did not meet the jurisdictional residency requirements of New Jersey in dissolution of marriage actions.

The New Jersey court entered its final judgment of divorce on June 19, 1995 and found that the wife resided in New Jersey for more than a year preceding the filing of the suit. The New Jersey court's ignoring of the Florida judgment was so complete that New Jersey's final judgment of divorce again terminated the marital status of the parties, despite the fact that Florida already had done so. (The Judge in New Jersey called Joe Rash a bigamist!)

B. The Proceedings Below.

On March 18, 1996, the New Jersey court entered an order pursuant to its divorce decree, directing that fifty percent of the husband's pension be distributed to the wife. The pension administrator, in Pennsylvania, then began taking 50% of the husband's pension, and routing it to Mrs. Rash. At that point, May 31, 1996, the husband proceeded against the wife in the United States District Court, M. D. of Florida, under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, seeking a declaratory judgment holding that the Florida judgment dissolving the marriage and dividing marital property was valid and entitled to full faith and credit in New Jersey, as opposed to the later New Jersey divorce decree.

The Middle District of Florida held that, as a court of limited jurisdiction, it did not have subject matter jurisdiction because federal courts usually do not review domestic relations cases and therefore, it lacked subject matter jurisdiction. The district court also found that the Florida judgment was not entitled to full faith and credit because the New Jersey court had found, pursuant to its March 31 temporary injunction, that the Florida court did not have personal jurisdiction over the wife. Thus, the Middle District Court dismissed the case.

The first decision, i.e., *Rash v. Rash*, 147 F. 3d 1291 (11th Cir. 1998), held that Florida was required to give full faith and

credit to the New Jersey temporary order entered March 31, 1994. On reconsideration, the Eleventh Circuit found that Florida was required to give full faith and credit to the final judgment of the New Jersey court entered June 19, 1995. The Court did not comment nor rule on when Florida was to give full faith and credit, and did not address the fact that by the time the final judgment in New Jersey was entered, Florida's final judgment was approximately eight months old.

REASONS FOR GRANTING THE WRIT

As discussed *infra*, the decision of the Eleventh Circuit Court of Appeals conflicts with various decisions of this Court. This Court established jurisdictional due process requirements which, if met, require the states to give full faith and credit to divorce decrees entered by another state. The decision below undermines these well established principles and effectively holds that full faith and credit does not apply to a divorce decree where the plaintiff followed all the jurisdictional and service of process statutes of the state where the decree was rendered.

Review should also be granted because the decision below has the potential to significantly undermine the statutes, laws, policies and enactments of the various states. Each state, as a sovereign, has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation, and the dissolution thereof, creates problems of large social importance; protection of offspring, property interests, legitimacy, enforcement of marital responsibilities, are but a few of the commanding problems in this area. A State's final divorce decree reflects not only its statutory enactments but also its laws, judicial and otherwise, and policies concerning domestic relations. When a State's statutory scheme complies with the U.S. Constitution, the laws of Congress and this Court respecting jurisdiction and due process, then to deny full faith and credit to that State's final divorce decree is error.

The lower court's decision would allow the court's of the fifty states a right to declare whether a particular court located in another state has jurisdiction, despite plaintiff's compliance with the jurisdictional statues of the foreign state. Effectively this puts each State's jurisdiction on volatile and unstable ground. It should not be the province of a New Jersey court to confer to take away jurisdiction from a Florida court, nor should it be within the province of any court located in another state to confer upon or take away jurisdiction of another State's courts. Under the present decision, a judge in one state is free to de-legislate the jurisdictional provisions of any other State's statutes under the guise of jurisdiction.

State laws confer jurisdiction upon that State's courts. Once the jurisdictional requirements of Florida's statutory service of process laws were followed, then jurisdiction attached. **Jurisdiction is not**, and should not become, **conditional**. Once conferred, jurisdiction is not to be taken away by a judge in another state. The lower decision effectively takes away the legislative authority in any given state, and in so doing, nullifying the right to vote of the individual citizens of each state because the representatives were overruled by a judge of another state. Thus, the Appellate Court's decision introduces into law the concept of circumstantial jurisdiction. This a serious and intolerable state of the law. A New Jersey court should not be able to determine if Florida has jurisdiction in contravention of Florida law. This gives the New Jersey court the right legislate in Florida.

The underlying decision could have the effect of throwing into chaos the very foundation of our court system, i.e., the jurisdiction that the courts of the various states have over its citizens in this very important area concerning its families, and the rights derived therefrom. Review should be granted because the decision below also has the potential to significantly undermine the various statutes, laws and policies of the various

states and to hold that the full faith and credit clause of the United States Constitution does not apply to judgments rendered in dissolution of marriage cases in the various states.

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE APPLICATION OF THE CONSTITUTION'S FULL FAITH AND CREDIT CLAUSE TO THE FINAL DIVORCE DECREES OF THE VARIOUS STATES.

The Eleventh Circuit wrongfully held that the Florida final judgment of dissolution of marriage was not entitled to full faith and credit in New Jersey. In *Williams v. North Carolina*, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577 (1945) (hereinafter also referred to as "Williams II"), this Court held that a divorce granted in Nevada, on a finding that one spouse was domiciled in Nevada, must be respected in North Carolina, where the wife had neither appeared nor served with process and even though recognition of such a divorce offended the policies of North Carolina.

> It can be made a judgment there only if the court purporting to render the original judgment had power to render such a judgment. A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits — had jurisdiction, that is, to render such judgement. *Id.* at 229.

As it concerns divorces, "jurisdiction, strictly speaking, is founded on domicile. . . . The domicile of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. . . ." *Id.* at 230.

> . . . Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the questions arises. *Id.*
>
> If a finding by the court of one State that domicil in another State has been abandoned were conclusive upon the old domiciliary State, the policy of each State in matters of most intimate concern could be subverted by the policy of every other State. This Court has long ago denied the existence of such destructive power. The issue has a far reach. For domicile is the foundation of probate jurisdiction precisely as it is that of divorce. *Id.* at 231.

The ruling by the New Jersey court has the destructive power of de-legislating Florida's jurisdictional statutes, including service of process provisions, and emasculating Florida's jurisdictional statutes, laws, policies, and ultimately the votes of the people of Florida. It makes their enactments, through their legislators, void and ineffective. It is this precise issue that becomes a matter for federal determination. *Id.* at 231, n.7.

Florida's laws meet the federal "conditions for the exercise" of its power and thus its divorce decree must be validly established in New Jersey. The problems of reconciling the respect to be afforded by the several states can be resolved ". . . because this Court is open to consider claims, such as this present case presents, that the courts of one State have not given the full faith and credit to the judgment of a sister State that is required by Article IV, § 1 of the Constitution". *Id.* at 233.

> The challenged judgment must, however, satisfy our scrutiny that the reciprocal duty of respect owed by the States to one another's adjudications has been fairly discharged, and has not been evaded under the **guise** of finding an absence of domicil and therefore a want of power in the court rendering the judgment.

Id. (emphasis added). This is precisely what New Jersey has done in the present case.

In *Williams II*, this Court could not "upset the judgment before us". *Id.* at 234. . . . "If it is a matter turning on local law, great deference is owed by the court of one State to what a court of another State has done". *Id.* The Nevada decree was entitled to full faith and credit in North Carolina, although the spouse had not been personally served. This Court stated, in *Williams II*, that improper intrusion into domestic relations subject to the authority of other States should be discouraged. It shows an "indifference by a State to the bond of the Union". *Id.* It is clear that Mr. Rash had a bona fide domicil in Florida and that Florida had properly acquired jurisdiction over the divorce proceedings and of the parties, pursuant to Florida law. According to *Williams II*, "at least one of the parties to each *ex parte* proceeding must have a bona fide domicil in the rendering State". *Id.* at 239 (Mr. Justice Murphy, concurring).

In *Williams v. North Carolina*, 317 U.S. 37, 63 S. Ct. 207, 213, 87 L. Ed. 279 (1942) (hereinafter also referred to as "Williams I") this Court acknowledged that solely the plaintiff's domicil in a state is essential in order to "give the court jurisdiction which will entitle the divorce decree extraterritorial effect, at least when the defendant has neither been personally served nor entered an appearance". *Id.* at 240. Since Mrs. Rash was personally served it makes our case stronger, that's without taking into account the fact that Florida was actually her domicil

rather than New Jersey. In concurring, Justice Murphy stated: "All of the uncontested divorces that have ever been granted in the forty-eight states are as secure today as they were yesterday or as they were before our previous decision in this case". *Id.* at 242. They are not after the present *Rash* decision.

It is this Court's function to lay the jurisdictional foundation upon which the States' determinations can be made effective within and without their individual borders. It is time for settled constitutional policy where one is so desperately needed, i.e., the definite line of demarcation as to when a State is obligated to apply the full faith credit clause to a final divorce decree of a sister State. Such decision cannot be left to the individual states, that would be an abdication of the duties of this Court. ". . . In no region of adjudication or legislation is stability more essential for jurisdictional foundations". *Id.* at 246 (Mr. Justice Rutledge, dissenting). The finding by the New Jersey court that Florida did not have *in personam* jurisdiction of Mrs. Rash, despite the fact that pursuant to Florida law Florida had *in personam* jurisdiction of Mrs. Rash, if allowed to stand, the policy "of each state in matters of most intimate concern could be subverted by the policy of every other State". This is precisely the chaos to which the opinion now under appeal would throw the laws of the fifty States and other judicial territories as every divorce decree becomes vulnerable in every state. Mobile America cannot withstand such chaos.

More than Florida's legislative enactments of jurisdiction and service of process are involved. Florida's final judgment of dissolution of marriage reflects its statutory enactments, laws, judicial and otherwise, and policies concerning domestic relations. Florida's results obtained in the *Rash* case are denied recognition. In all the proceedings in *Rash*, no one has stated that there was any element of fraud or deceit or evasion of Florida's laws. Florida in no way failed to comply with every

requirement that the U.S. Constitution, this Court, the laws of Congress, respecting jurisdiction or due process, require for rendering a valid divorce decree. What else could Mr. Rash have done than to go to his attorney in Florida to begin divorce proceedings against Mrs. Rash? Mr. Rash fully complied with Florida's laws, and thus the Florida judgment is valid under federal constitutional standards. To deny it full faith and credit in New Jersey is error.

If the present ruling were to stand, for all practical purposes, it appears that the law may become that states of the domiciliary origin of the spouse not present in the rendering state are free to deny full faith and credit to divorces granted elsewhere. As discussed *infra*, a bottom line distillation of this Court's rulings on divorce law is that if one person is domiciled in a state and that state's jurisdictional laws comply with federal due process requirements, then that State's divorce decree is entitled to full faith and credit in all of the other States. The facts of this case puts the crux of the matter before this Court. If full faith and credit is to be given to divorce decrees then the final judgment of dissolution of marriage entered in the *Rash* case in Florida must get full faith and credit in New Jersey. If full faith and credit is to be denied to the Florida decree, then full faith and credit is not to be given to divorce decrees. In that event, attorneys everywhere will have to guess as to what advice to render to their domiciliary clients.

> For this has become a nation of transient people. Lawyers everywhere advise for or against divorce and courts grant or deny it, depending not on the probability that the case will come here, but what is done here with the few cases which do come. The matter is altogether too serious, for too many, for glossing over the crucial basis of decision.

Id. at 252 (Mr. Justice Rutledge, dissenting). Actually this case comes down to a sheer denial of faith and credit to Florida's laws and policies not merely her judgment.

The exception for want of jurisdiction, in applying the full faith and credit clause, was never intended to allow the states to ignore the provisions and each other's policies, once crystallized in judgment, when every requisite for jurisdiction has been satisfied and there is no showing of fraud. Consistent with the constitutional mandate of full faith and credit the jurisdictional issue is settled by the laws of the rendering State, whether being decided in Florida or New Jersey. The jurisdictional issue is *not* to be used to enable another State to destroy the requirements of the Federal full faith and credit clause. Our Constitution has foreclosed the freedom of states to apply their own local policies. New Jersey nor the federal courts are free to disregard it. The effect of the present decision is to infuse uncertainty and confusion in this delicate human relation which requires stability upon which depends how the distribution of power is made among the various states.

Jurisdiction is the issue. Therefore, the Appellant suggests that the definite line of demarcation should be when a state, pursuant to its jurisdictional and process laws, acquires *in personam* jurisdiction over the defendant, by service of process, as long as that state's laws comply with federal standards of due process. At that point, since jurisdiction attaches, the state which renders the final divorce decree would have *in personam* jurisdiction over both parties. Therefore, said rendering state's divorce decree would be legally entitled to full faith and credit in all of its sister states. Such a standard could be easily and fairly applied. Given our extremely mobile society, and the high divorce rate, it appears that the problems of the *Rash* case will significantly increase in the future.

Granting certiorari affords this Honorable Court the opportunity to inject uniformity to divorce laws. Since this Court last spoke on this issue, the nation has become much more transient. We have a country that is connected by the Internet, multiple vehicles, multiple businesses and homes in various states. Adding to the importance of having some uniformity in this area is the high divorce rate, which is now around 50% of all marriages. Promulgating and enforcing a policy that is predictable, which shows that when a divorce is properly obtained in a rendering state that judgment is entitled to full faith and credit in all other states, will add predictability and uniformity in this sensitive area of the lives of the citizens of the United States. Mr. Rash's full compliance with Florida's laws, including domicil and jurisdiction, should not have been a gamble for Mr. Rash. The consequences and the stakes were too high. Mr. Rash, who is disabled, lost half his pension as well as other valuable assets in New Jersey, at a time when Mrs. Rash was fully employed.

To allow the present decision to stand would be to rule that New Jersey has extra-territorial power to regulate marriages within Florida's territorial boundaries. It is abundantly clear that New Jersey has not given the Florida final decree the same effect that said decree would be given in the courts of Florida. That is the Constitutional test. The law requires that final judgments be given to them the same law or usage given in the courts of the state from which they are taken. 28 U.S.C. § 687. New Jersey must not be permitted to disregard the Florida decree without passing upon the faith and credit which Florida itself would give to said decree under Florida's law or usage.

The present opinion requires Florida to give full faith and credit to the New Jersey decree, which was acquired after Florida's decree was clearly entitled to full faith and credit.

That makes no sense and allows New Jersey to arbitrarily strike down Florida's judgments, policies, statutes, laws, and ultimately, the will and vote of the people of Florida. This destabilizes the entire judicial process. The present decision allows, by a stroke of a pen, a judge to de-enact the statutes of another state, rescind the policies and traditions of other states, tell legislatures and legislators that their acts are void, and ultimately that all voters are subject to the will of all judges sitting in all the other states. When one state fails to give the full faith and credit to divorce decrees which Congress and the Constitution commands, then this Court becomes the final arbiter and the only recourse for someone who has been as slighted as Mr. Rash has in these proceedings. The Constitutional and Congressional command is that the Florida divorce decree legally is entitled to full faith and credit in New Jersey.

The facts of *Atherton v. Atherton*, 181 U.S. 155, 21 S. Ct. 544, 45 L. Ed. 794 (1901) are very similar to the case at bar. There, service of process was acquired by mailing the complaint and the summons to the post office nearest to the absent wife's residence in New York. Said procedure complied with the laws of Kentucky, and it was therefore held that the decree was entitled to full faith and credit in the courts of New York. *Atherton* allowed that there must be notice to the defendant, either by service of process or publication or other constructive notice. Here it is clear that Mrs. Rash actually received personal service. In 1901, through *Atherton*, this Court, referring to full faith and credit and the Congressional enactment thereof, stated "[t]his section was intended to give the same conclusive effect to the judgment of all the states, so as to promote certainty and uniformity in the rule among them". *Id.* at 160. The area of domestic relations desperately needs certainty and uniformity in this day and age.

> . . . The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The state, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties, guilty of acts for which, by the law of the state, a dissolution may granted, may have removed to a state where no dissolution is permitted. The complaining party would therefore fail if a divorce were sought in the state of the defendant; and if application could not be made to the tribunals of the complainant's domicil in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress.

Id. at 163. Since Mr. Rash had lived in Florida for approximately 18 months prior to filing his dissolution of marriage action, it is clear that Florida was the only place Mr. Rash could seek a dissolution of his marriage.

See also Burlen v. Shannon, 115 Mass. 438, 96 Am. Dec. 733 (the husband and wife were living apart, in the absence of any proof of fraud or misconduct on his part, the divorce obtained by him in the state of his domicil, after reasonable notice to her, either by personal service or by publication in accordance with the laws of his domicil state, was valid); and *Cheely v. Clayton*, 110 U.S. 701, 28 L. Ed. 298, 4 S. Ct. Rep. 328 (1884) (When the laws of the rendering state have been followed, a divorce so obtained is valid everywhere.). "But in order to make the divorce valid, either in the state in which it is

granted or another state, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first state required". *Cheely v. Clayton*, *supra* at 705. It seems to be well established by this Court that once a plaintiff abides by the laws of the state rendering the divorce decree, that decree is valid everywhere. In *Felt v. Felt*, 59 N.J. Eq. __, 47 L. R. A. 546, 45 Atl. 105 (1899), the New Jersey Supreme Court upheld the validity of a divorce obtained in the state of Utah by a husband having his bonafide domicil there against a wife whose domicil was in New Jersey, after publication of the process and complaint in accordance with the statutes of Utah and personal service upon the wife in New Jersey. Those facts appear similar to the facts of this case.

The *Atherton* case was grounded on the plaintiff's compliance with the laws of Kentucky, the state rendering the divorce decree. This Court went so far as to say ". . . the question in this case is not whether she had actual notice of the proceedings for divorce, but whether such reasonable steps had been taken to give her notice as to bind her by the decree in the state of domicil". *Atherton*, *supra* at 172. Mrs. Rash's receipt of actual personal notice far exceeds this requirement. This Court equated Mrs. Atherton's receipt of due notice, according to Kentucky statute, as though she had actually been served with notice in Kentucky or as if she had "voluntarily appeared in the suit". *Id.* at 173. Thus, said compliance with Kentucky law would be "[b]inding her to that full extent, it established, beyond contradiction, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment". *Id.* The case was remanded to the Supreme Court of New York for entry of an order giving full faith and credit to the Kentucky decree.

The facts in *Thompson v. Thompson,* 226 U.S. 551, 33 S. Ct. 129, 57 L. Ed. 347 (1913) are similar to the case at bar. It

was found that the husband was in conformity with the "mode prescribed by statute," i.e., the Virginia Code, since the decision of the state court accepting jurisdictional evidence was deemed to be sufficient to confer jurisdiction in accordance with local law. That being the case, ". . . it is clear that the resulting decree is entitled, under the act of Congress, to the same faith and credit that it would have by law or usage in the courts of Virginia". *Id.* at 566. On the basis recognized by the laws of Virginia, the Virginia decree foreclosed any right of the wife to have alimony or equivalent maintenance from her husband. Thus, the Virginia divorce decree barred the wife's action for maintenance in the courts of the District of Columbia.

Davis v. Davis, 305 U.S. 32, 59 S. Ct. 33, 83 L. Ed. 26 (1938) also involved the credit to be given a Virginia decree in a District of Columbia court. This Court pronounced: "Thus Congress rightly interpreted the clause to mean not some but **full credit**". *Id.* at 40 (emphasis added). The *Davis* panel concluded that petitioner was "entitled as a matter of right to have the Virginia decree given effect in the court of the District of Columbia". *Id.* at 43.

> Each state as a sovereign has a rightful and legitimate concern in the martial status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state by virtue of its command over its domiciliaries and its large interest in the institution of marriage can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There

> is no constitutional barrier if the form and nature of the substituted service . . . meet the requirements of due process.

Williams v. North Carolina, 317 U.S. 287, 298-299, 63 S. Ct. 207, 213, 87 L. Ed. 279 (1942) (citations omitted). No one has argued, nor is it alleged, that Mr. Rash's action in the Florida divorce fell short of the federal requirements of due process. The effect of the *Rash* decision, as in *Williams I*, could be that a person could be found to be a bigamist if a decree in one state were deemed unlawful, and to be jailed as a result thereof.

> Children of the second marriage would be bastards in one state but legitimate in the other. And all that would flow from the legalistic notion that where one spouse is wrongfully deserted he retains power over the matrimonial domicil so that the domicil of the other spouse follows him wherever he may go, while if he is to blame, he retains no such power. But such considerations are inapposite. *Id.* at 300.
>
> . . . Certainly if decrees of a state altering the marital status of its domiciliaries are not valid throughout the Union even though the requirements of procedural due process are wholly met, a rule would be fostered which could not help but bring "considerable disaster to innocent persons" and "bastardize children hitherto supposed to be the offspring of lawful marriage. . . .
>
> . . . But society also has an interest in the avoidance of polygamous marriages . . . and in the protection of innocent offspring of marriages deemed legitimate in other jurisdictions. And other states have an equally legitimate concern in the status of

> persons domiciled there as respects the institution of marriage. So when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter. *Id.* at 301-303.

Thus, Mr. Rash calls on this Court, as the final arbiter on the application of full faith and credit, in his quest for justice. "There is but one respect in which this Court can, within its traditional authority and professional competence, contribute uniformity to the law of marriage and divorce, and that is to enforce respect for the judgment of a state by its sister states when the judgment was rendered in accordance with settled procedural standards. As the Court's opinion shows, it is clearly settled that if a judgment is binding in the state where it was rendered, it is equally binding in every other state. This rule of law was not created by the federal courts. It comes from the Constitution and the Act of May 26, 1790, c. 11, 1 Stat. 122". *Id.* at 306 (Mr. Justice Frankfurter, concurring). Precisely because the process for rendering the Florida decree satisfies the due process clause, and is binding in Florida upon Mrs. Rash, that this Honorable Court is called upon to decide that the Florida final judgment of dissolution of marriage, which is unassailable in Florida, is therefore entitled to full faith and credit in all the other states. It is indisputable that the Florida decree involved herein is valid and binding in Florida. It is clear and unequivocal that the Florida decree was rendered under circumstances that makes it binding in Florida against Mrs. Rash and thus, the lower opinion must be reversed.

> . . . [M]arriage and the family have generally been regarded as basic components of our national life, and the solution of the problems engendered by the marital relation, the formulation of standards of public morality in connection therewith, and the supervision of domestic (in the sense of family) affairs, have been left to the individual states. Each state has the deepest concern for its citizens in those matters, and concomitantly with that concern, it exercises the widest control over marriage, determining how it is to be solemnized, the attendant obligations, and how it may be dissolved. When a conflict arises between the divergent policies of two states in this area of legitimate governmental concern, as here, this Court should give appropriate consideration to the interests of each state.
>
> In recognition of the paramount interest of the state of domicile over the marital status of its citizens, this Court has held that actual good faith domicile of at least one party is essential to confer authority and jurisdiction on the courts of a state to render a decree of divorce that will be entitled to extraterritorial effect under the Full Faith and Credit clause . . .

Williams I, *Id.* at 308-309 (Mr. Justice Murphy, dissenting).

> Marital status involves the regularity and integrity of the marriage relation. It affects the legitimacy of the offspring of marriage. It is the basis of criminal laws, as the bigamy prosecution in Williams v. North Carolina dramatically illustrates. The State has a considerable interest in preventing bigamous marriages and in protecting the offspring of marriages from being bastardized. The interest of

> the State extends to its domiciliaries. The State should have the power to guard its interest in them by changing or altering their marital status and by protecting them in that changed status throughout the farthest reaches of the nation. . . .

Estin v. Estin, 334 U.S. 541, 546, 68 S. Ct. 1213, 1217, 92 L. Ed. 1561 (1948).

The uncertainties promulgated by the Appellate Court's decision in *Rash* effects fundamental rights and relations such as the lawfulness of cohabitation, children's legitimacy, title to property, and even whether a citizen is law-abiding or a criminal. Mr. Rash, as well as the rest of the citizens in the United States, are entitled to expect from their law makers and the rules of law, predictability that will enable U.S. citizens to decide whether they are married and if so to whom, and to know what other rights derive from their legal marriage or legal dissolution thereof. In our nomadic society the uncertainties presented by the case at bar effect large numbers of people and create a social problem of magnitude. We seek certiorari from this great Court to add predictability and justice to this area of law. The imposition of the New Jersey court's decision upon the Florida final judgment, beyond its borders involves a forbidden infringement of a legitimate domestic interest of Florida. Thus, it is this Court which must determine for itself the extent to which New Jersey may deny the Florida judgment or otherwise qualify it, under the guise of jurisdictional infirmities. And if that analysis were to be allowed to be made by New Jersey it must be made applying Florida law. The incidental consequences of Mrs. Rash's ability to forum shop also should be curtailed.

In *Sherrer v. Sherrer,* 334 U.S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429 (1948), this Court considered the full faith and credit to be given by a Massachusetts court to a decree of divorce

rendered in a Florida court. The respondent received notice by mail of the pendency of the Florida divorce proceedings. The Florida court had found that the petitioner was a bona fide Florida resident and that the Florida court had jurisdiction of the parties and the subject matter. In *Sherrer*, quoting from an earlier case, this Court stated:

> This Court has also held that the doctrine of *res judicata* must be applied to questions of jurisdiction in cases arising in state courts involving the application of the full faith and credit clause where, under the law of the state in which the original judgment was rendered, such adjudications are not susceptible to collateral attack.

Id. at 350. This Court, reiterating *Davis* and its progeny, articulated the standard which applies here, i.e.,

> . . . the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been afforded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree.

Id. at 351-352 (footnotes omitted).

Although Mrs. Rash did not participate in the Florida proceedings, she certainly was **afforded** full opportunity to contest the jurisdictional issue in Florida. In *Sherrer*, because the plaintiff in the Florida case had met Florida's requirements for a dissolution of marriage, including compliance with the jurisdictional statutes of Florida, this Court held ". . . that the Massachusetts courts erred in permitting the Florida divorce

decree to be subjected to attack on the ground that petitioner was not domiciled in Florida at the time the decree was entered . . . If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own". *Id.* at 352. Accordingly, Mrs. Rash's decision to answer Mr. Rash's Florida petition by filing a petition in New Jersey, is of her own doing, and it certainly does not strip the Florida court's jurisdiction where Florida laws were fully followed by Mr. Rash. This Court, in *Sherrer*, stated:

> [i]n resolving the issues here presented, we do not conceive it to be part of our function to weigh the relative merits of the policies of Florida or Massachusetts with respect to divorce or related matters. Nor do we understand the decisions of this Court to support the proposition that the obligation imposed by Article IV, § 1 of the Constitution and the Act of Congress passed thereunder, amounts to something less than the duty to accord full faith and credit to decrees of divorce entered by courts of sister States.

Id. at 354-355. Once rendered, the Florida divorce decree in *Rash* was not susceptible to collateral attack in Florida, therefore not in New Jersey. Thus, New Jersey has "the duty to accord full faith and credit" to Florida's divorce decree.

> . . . We believe that in permitting an attack on the Florida divorce decree which again put in issue petitioners's Florida domicil and in refusing to recognize the validity of that decree, the Massachussets courts have asserted a power which cannot be reconciled with the requirements of due faith and credit. We believe that assurances that such

> a power will be exercised sparingly and wisely render it no less repugnant to the constitutional commands.

Id. at 355. In the case at bar, New Jersey has asserted a power that cannot be reconciled with the requirements of "due faith and credit". It is clear that Mr. Rash's actions, as well as Florida's laws on jurisdiction and process thereof, are consistent with the highest requirements of due process.

"The purpose of the full faith and credit clause is to lengthen the arm of the state court and to eliminate state lines as a shelter from judicial proceedings". *Barber v. Barber*, 323 U.S. 77, 88, 65 S. Ct. 137, 89 L. Ed. 82 (1944) (Mr. Justice Jackson, concurring). The New Jersey court was *not* free to search the laws of Florida to see whether its judgment terms were erroneous.

Erroneously ruling that Mrs. Rash had a right to subsequently defeat the enforcement of the Florida judgment, the opinion cites, among others, the case of *Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc.*, 734 F.2d 639 (11th Cir. 1984). However, *Borg-Warner* rests upon the proposition that the rendering court lacked jurisdiction. It is abundantly clear that Florida did not lack jurisdiction over Mrs. Rash.

The case of *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244 (1931), also was cited in the underlying cause. There a special appearance was entered by the defendant contesting jurisdiction. The *Baldwin* Court found "[t]he special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person". *Id.* at 518. The corporate respondent could elect not to appear at all. After the defendant was defeated upon the jurisdictional issue, defendant made no further appearance in the case. In our

case, the Court of Appeals concluded since Mrs. Rash had not appeared in Florida that the subject of jurisdiction could be re-litigated in the New Jersey court. However, in Mr. Rash's case, Mr. Rash's day in the New Jersey court would have been after the final judgment of dissolution of marriage had been rendered by the Florida court. The facts of *Baldwin* appear to be distinguishable to the circumstances and the issues in *Rash*, and therefore, *Baldwin* is inapplicable.

Hazen Research, Inc. v. Omega Minerals, 497 F.2d 151 (5th Cir. 1974) states that ". . . the 'burden of undermining (the judgment) rests heavily upon the assailant,' . . . and, should the attack fail, the default judgment becomes no less final and determinative on the merits of the controversy than a decree entered after full trial". *Id.* at 154 (citations omitted). However, that determination would have to be made pursuant to Florida law. In other words, Mrs. Rash had the "burden of undermining" the Florida judgment and in that process in New Jersey, the New Jersey court would have to make its decision on jurisdiction based upon Florida law. It is clear that New Jersey did not do that.

In *Hazen*, the Circuit Court of Appeals found that the defendant had failed to demonstrate any error on plaintiff's part in effectuating the service that would deprive the Colorado court of jurisdiction under local Colorado law. The defendant was a corporation that was contending that it did not transact business in Colorado within the meaning of the Colorado statute and thus, did not possess those minimum contacts with Colorado necessary for a constitutional exercise of power. The Colorado court found that Omega was subject to Colorado's jurisdiction. The Colorado court concluded that there was an ample basis for Colorado law to exercise its long arm jurisdiction over the defendant in the suit. The U.S. Court of Appeals for the Fifth Circuit ultimately concluded that the Colorado judgment was

entitled to full faith and credit in the Missouri Federal District Court. The defendant's constitutional objection to Colorado's assertion of *in personam* jurisdiction was found to be "a little more than frivolous". *Id.* at 155. Although *Hazen* involved consideration of corporate minimum contacts in Colorado, it is clear that the Court upheld the validity of the Colorado judgment, and thus its right to full faith and credit in the various forums, on the basis that the plaintiff had followed the mandates of Colorado's jurisdictional and service of process statutes. The same is true in the present case, except that the contacts with Florida were substantially greater in the *Rash* case. Since Mr. Rash followed all of Florida's requirements for jurisdiction the outcome should be the same, i.e., that the Florida divorce decree be afforded full faith and credit in New Jersey.

The facts of *Nowell v. Nowell*, 157 Conn. 470, 254 A.2d 889 (1969) are very similar to this case. In *Nowell*, the wife had commenced a divorce action in Connecticut. While that was pending, the husband started a divorce action in Texas and completed it. In giving the Texas final judgment full faith and credit, the Connecticut Supreme Court ruled that despite the fact that the Connecticut trial court had issued an injunction prohibiting the husband from proceeding in Texas, the Connecticut court **had** to recognize the Texas foreign judgment of divorce. Our facts appear to be stronger since Mr. Rash commenced his divorce action prior to Mrs. Rash commencing her New Jersey divorce action. We believe that the outcome of *Nowell* is what should be the outcome in *Rash*.

What was left to be done to obtain personal jurisdiction over Mrs. Rash? In its prior *Rash* opinion, the Eleventh Circuit Court of Appeals stated that it did not understand the holding of the District Court "with regard to jurisdiction over the wife, who was properly served with Florida process". The Florida court obtained personal jurisdiction over Mrs. Rash via

compliance with its long arm statute. The Appellate Court's present opinion seems to be that since Mrs. Rash did not appear in Florida, Florida never obtained jurisdiction over her. This makes jurisdiction circumstantial. Anyone who does not want to be subject to another State's jurisdiction can merely fail to appear. Once Mr. Rash complied with all of Florida's jurisdictional requirements, having met the requirements to the letter of the law, how could a New Jersey court determine that Florida did not have jurisdiction over Mrs. Rash? Does a non-final order, as the December 14, 1994, finding jurisdiction in a New Jersey court, override a final judgment of a Florida court? If New Jersey is empowered to determine that Florida did not have jurisdiction in contravention of the Florida final decree and Florida laws, it gives the New Jersey judge the right to legislate in Florida.

CONCLUSION

When a citizen of any state properly files a divorce action, pursuant to the state's jurisdictional statutes, including compliance with the state's long arm statutes, and plaintiff properly serves the defendant in another state, then at that point the court where the action is filed obtains jurisdiction over the foreign defendant. This is so if the state's statutes where the action is filed complies with federal due process requirements. The defendant's response should not be the crucial point upon which jurisdiction turns. Once jurisdiction is conferred, according to the laws where the action was instituted, it cannot be stripped away by anyone's actions nor judicial determinations in a foreign forum. Once a final divorce decree is entered, meeting the federal due process requirements, said judgment is entitled to full faith and credit pursuant to the United States Constitution Article IV, Section I and the Congressional enabling act.

Endowing one state with controlling authority to nullify the power of a sister state to grant a divorce to one of its domiciliaries, or to abrogate its jurisdictional statutes, based upon a guise of findings that the first state does not have jurisdiction, is indefensible and potentially chaotic. A New Jersey court cannot, nor should it be expected to, assume "comprehensive attention to the various and potentially conflicting interests that other states may have in the institutional aspects of marriage". The underlying opinion conflicts with this Court's prior cases and well established parameters in the area of full faith and credit as applied to divorce decrees. Endowing the New Jersey court with controlling authority to nullify the power of a sister State's jurisdictional laws, including abrogating its statutes, policies, enactments, legislatures' and legislators' actions, and thereby nullifying the voting power of the citizens of a sister state, is intolerable. The Appellant asks that this Honorable Court, as the final arbiter, reverse the subject decision and set a line of demarcation in this area of law where consistency is so desperately needed.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 30, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2531

D. C. Docket No. 96-1077-CIV-T-17B

JOSEPH J. RASH,

Plaintiff-Appellant,

versus

JOANN H. RASH,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(April 30, 1999)

Before BARKETT, Circuit Judge, GODBOLD and GOODWIN*, Senior Circuit Judges.

GODBOLD, Senior Circuit Judge:

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* Honorable Alfred T. Goodwin, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Appendix A

This case involves a dispute in federal court between a former husband and wife over the priority to be accorded to two competing state court judgments entered in the courts of different states.

Both husband and wife had contacts with the states of Florida and New Jersey. On February 25, 1994 the husband sued for divorce in state court in Florida. On March 14 the wife was served with process under Fla. Stat. Ann. § 48.193, which provides that, for persons maintaining a matrimonial domicile in the state, Florida has personal jurisdiction with respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage. The wife entered no appearance in the Florida case.

On March 21, 1994 the wife sued for divorce in state court in New Jersey. The next day she filed in the New Jersey court an emergency application asking that the husband be restrained from proceeding in the Florida divorce action. The court set a "return" for March 29 and directed that the husband be given notice.

On March 29, 1994 the husband filed a response, describing contacts that he and his wife had with Florida and describing the filing of the Florida divorce action and service of process on his wife. The wife filed a response, alleging that the parties' residence was New Jersey and denying Florida residence. The same day, March 29, the court heard oral argument with counsel for both parties present and participating.

On March 31, 1994 the New Jersey court entered an order finding that the husband was subject to the *in personam*

jurisdiction of the New Jersey court and restraining him from proceeding *in personam* against the wife in the Florida divorce action and from obtaining relief on any issues regarding distribution of personal and real property, attorney fees, cost and suit money, or the parties' marital debts.

In the March 31 order the New Jersey court set the matter down for a plenary hearing on May 10, 1994, on whether the temporary injunction should be made permanent and for other relief. However, the hearing was not conducted on May 10.

On July 8, despite the New Jersey injunction, the husband filed a motion for leave to proceed in Florida, which the Florida court granted.

On October 21 the Florida court entered a "Final Judgment of Dissolution of Marriage." The husband had appeared and submitted his testimony and other evidence. The wife had entered no appearance. The court found that the husband had been a resident of Florida for six months next preceding the filing of his petition and that the court had jurisdiction of the parties. It directed that real property in New Jersey should be equally divided between husband and wife, that the husband should have sole ownership of his Pennsylvania Retirement System pension, and declared that the wife have no form of alimony or support from the husband. The court expressly retained jurisdiction for the purpose of enforcing all terms and provisions of the final judgment.

On November 17, 1994 the wife asked the New Jersey court to direct that proceeds of a sale that had been made of

the New Jersey real estate be held in escrow and that the husband be held in contempt for violating the injunctive order of March 31.

On December 5, 1994 the New Jersey court ordered the real estate proceeds held in escrow.

On December 9, 1994 the New Jersey court conducted a hearing on the issue of jurisdiction. Both parties were present with their counsel and testimony was taken.

On December 14 the New Jersey court entered an order finding that Florida had inappropriately asserted *in personam* jurisdiction over the wife, that New Jersey had sole *in personam* jurisdiction over both parties, and that it was the appropriate forum to resolve those issues relating to distribution of property and support.

On December 19 the husband filed an answer and counterclaim in the New Jersey case.

On June 19, 1995 the New Jersey court entered a "Final Judgment of Divorce." It ruled that both parties and counsel had appeared before it. It found that the wife had resided in New Jersey for more than a year preceding the filing of the suit and that jurisdiction had been acquired over the husband. The court divided New Jersey real property and a trailer located in Florida and held the wife was entitled to alimony and half of the husband's social security payments and of his disability pension.

On March 18, 1996 the New Jersey court acting "pursuant to the terms of the Final Judgment of Divorce"

entered on June 19, 1995 directed fifty percent of the husband's pension to be distributed to the wife.

The husband brought this suit against the wife on May 31, 1996 in the United States District Court, M.D. Florida, under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, alleging that the Florida judgment dissolving the marriage and dividing property is valid, as opposed to the later New Jersey judgment that also purported to dissolve the marriage and divide property.

The wife moved to dismiss this case. The district judge held that the federal court, as a court of limited jurisdiction, did not have subject matter jurisdiction, on the ground that federal courts usually decline review of domestic relation cases over which state courts traditionally have jurisdiction. Although the court concluded that it lacked subject matter jurisdiction it also found that the Florida judgment was not entitled to full faith and credit because the New Jersey court had found (at the temporary injunction stage in March 1994) that Florida did not have personal jurisdiction over the wife. The court dismissed the case and the husband appealed.

In our decision, *Rash v. Rash*, 147 F.3d 1291 (11th Cir. 1998) this panel ruled with the wife and held that Florida was required to give full faith and credit to the New Jersey order entered March 31, 1994. On reconsideration we adhere to the view that the wife prevails but on a different ground, that Florida is required to give full faith and credit to the New Jersey judgment entered June 19, 1995. We withdraw the prior opinion and substitute this opinion in its place.

The husband filed a motion to file out of time a petition for rehearing/rehearing en banc. The panel pointed out to counsel that a judgment need be given only the same credit, validity and effect that it had in the state where it was pronounced and noted that the parties had not briefed New Jersey law on this issue. Therefore, the panel called on the parties to file supplemental briefs on the issue of whether the New Jersey order of March 31 was entitled to full faith and credit under the law of New Jersey. Supplemental briefs have been filed. The panel has considered those briefs and reconsidered the case.

First, we look to the jurisdiction of the federal court to consider this case. Diversity jurisdiction under 28 U.S.C. § 1332 is subject to a judicially created exemption for domestic relations and probate cases. But the exception is narrowly confined; it is not an absolute rule, but rather the question is whether the court in its discretion should abstain. *Kirby v. Mellenger*, 830 F.2d 176, 179 (11th Cir. 1987). The court should abstain only when hearing the claim would require the court to delve into the parties' domestic affairs. *Ingram v. Hayes*, 866 F.2d 368, 370 (11th Cir. 1988). Primarily, this case is a dispute over assets — alimony, rights to pension, and real property in New Jersey and Florida — and only secondarily of domestic differences. It is not a dispute over a single decree but over which of two competing state decrees should be enforced. Also it concerns the interests of two states and of their respective courts in protecting their judgments and their constitutional entitlement to full faith and credit. It does not raise the types of concerns that justify application of the domestic relations exception.

District courts will enforce a divorce decree of a court of another state under the full faith and credit clause. *Williams v. North Carolina*, 325 U.S. 226 (1945). The federal court is open to consider claims that the courts of one state have not given the full faith and credit to the judgment of a sister state that is required by Article IV, § 1 of the Constitution. The discharge of this duty does not make the court a court of probate and divorce. *Id.* at 232-33. Accordingly there is federal jurisdiction over this proceeding.

We conclude that the March 31 order lacked the finality New Jersey requires of an order to entitle it to full faith and credit. Whether action by a court possesses the necessary finality to be a final judgment is determined by the local law of the state of rendition. *Restatement (Second) of Conflict of Laws* § 107 (1971). A judgment is not a final judgment if further judicial action by the rendering court is required to resolve the matter litigated. *Id.* at cmt. a. A second court is free to refuse to honor a sister state judgment insofar as the judgment remains subject to modification by the original court. *Id.* at cmt. c.

In *Paramore v. Paramore*, 108 A.2d 455-458 (N.J. Super. Ct. App. Div. 1954) the New Jersey court said:

> In my judgment the faith and credit contemplated by the constitution and the laws only extends to judgments or decrees, and has no reference whatsoever to process in the nature of an execution . . .
>
> The transcendent force given by the federal laws to the judicial proceedings of sister states is

> confined to such judicial determinations as possess the quality of judgment; it does not extend to proceedings in the nature of execution, or to orders merely ancillary to some special form of relief.

(citations omitted).

In *Frank v. Frank*, 81 A.2d 172 (1951) the New Jersey Supreme Court was faced with whether full faith and credit would be given to a Florida decree. It held that the Florida decree was merely an adjudication of contempt that could be modified, vacated or changed. It was, therefore, not a final judgment entitled to enforcement under full faith and credit principles. Though addressing a Florida order the case applied New Jersey's rule requiring finality pursuant to standards of the rendering state as a prerequisite for full faith and credit.

When we apply New Jersey law to the New Jersey order of May 31 it appears that New Jersey would not extend full faith and credit to such an order. It was only an order *pendente lite* with the issue of jurisdiction to be finally determined in a later plenary hearing. The effect of an interlocutory order on the finality of a judgment depends on the law of the rendering state. Scoles and Hay, *Conflict of Laws* 963 (1992). Moreover, injunctions against litigation in sister states are said not to be entitled to full faith and credit. *Id.* at 981.

We turn then to the consequences of the final judgment entered in New Jersey on June 19, 1995 and the earlier Florida judgment of October 21, 1994. Where a party appears

for the purpose of litigating the question of jurisdiction, presents its case and is fully heard, he is thereafter concluded on the judgment of the court to which he has submitted the matter. *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931). *Baldwin* presents the situation in which the court has proceeded to judgment on the issue of jurisdiction. In the present case the only court that has addressed the issue of jurisdiction with both parties present and participating is the New Jersey court. It determined the place of jurisdiction as New Jersey.

The husband contends that the Florida judgment controls because it was first in time and that the Florida court had *in personam* jurisdiction over the wife, pursuant to Fla. Stat. Ann. § 48.193(1)(e). That argument is unavailing. The wife had not appeared in the Florida case and was in default. A defendant may defeat subsequent enforcement of a default judgment in another forum by demonstrating that the judgment issued from a court lacking personal jurisdiction even if the court entering the default determined that it had personal jurisdiction over the defendant. *Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc.*, 734 F.2d 639, 640-41 (11th Cir. 1984); *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 154 (5th Cir. 1974); 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4430 (1981).

The wife was free to question in the New Jersey proceedings the determination by the Florida court that it had personal jurisdiction over the parties. The New Jersey court, with both parties present and participating, was free to rule on the jurisdictional issue in its plenary hearing of

December 9, 1994, and to enter its order of December 14, 1994, and its final judgment of March 6, 1995. That judgment controls. New Jersey is the only court with jurisdiction over both parties to have determined the issue of jurisdiction. That judgment is entitled to full faith and credit. The purported final judgment entered in Florida is not entitled to full faith and credit because a court with jurisdiction — New Jersey — has found that Florida lacked jurisdiction. If the husband wished to question the judgment of the New Jersey court concerning jurisdiction he could have done so in the courts of New Jersey where both parties were present and participating.

The previous opinion of this court is VACATED and this opinion substituted in its place. The judgment of the district court is AFFIRMED. The husband may, if he chooses, file a petition for rehearing/rehearing en banc under the usual procedures of this court.

Appendix A

BARKETT, Circuit Judge, concurring:

I concur with the majority in its holding that the October 21, 1994 judgment of the Florida court is not entitled to full faith and credit. This is not a case where both parties appeared to present their respective positions in both jurisdictions. To the contrary, Ms. Rash never appeared by counsel or otherwise before the Florida court, and instead continued to prosecute her claim in New Jersey. In contrast, Mr. Rash did appear with counsel in New Jersey and participated fully in the case there. The New Jersey court's determination of December 14, 1994 that the Florida court lacked personal jurisdiction over Ms. Rash was reached after a hearing at which both parties were represented and were able to present their arguments. The New Jersey court was thus the first court of competent jurisdiction to pass judgment in this case, and we are therefore obliged to give its judgment, and not that of the Florida court, full faith and credit. Where a "defendant makes no appearance and the judgment goes by default, the defendant may defeat subsequent enforcement in another forum by demonstrating that the judgment issued from a court lacking personal jurisdiction." *Hazen Research Inc. v. Omega Minerals, Inc.*, 497 F.2d 151 (5th Cir. 1974); *see also Baldwin v. Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 525 (1931) ("[The defendant] had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment, and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction.").

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION ON DEFENDANT'S MOTION TO DISMISS COMPLAINT FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION DATED MARCH 26, 1997

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 96-1077-CIV-T-17

JOSEPH J. RASH,

Plaintiff,

vs.

JOANN H. RASH,

Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS COMPLAINT FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

This cause is before the Court on Defendant Joann H. Rash's Motion to Dismiss Complaint for Declaratory Judgment and Permanent Injunction (Dkt. 5) on the following grounds: 1) failure to state a cause of action; 2) lack of subject matter jurisdiction; and 3) lack of personal jurisdiction. In response, Plaintiff Joseph J. Rash has filed a Memorandum

in Opposition to Defendant's Motion to Dismiss (Dkt. 15). Upon consideration, this Court concludes that subject matter jurisdiction is lacking in this action and grants the motion to dismiss.

BACKGROUND

Plaintiff, Joseph J. Rash, and Defendant, Joann H. Rash, were married on February 10, 1968 in Philadelphia, Pennsylvania. On February 25, 1994, Joseph Rash began divorce proceedings against Defendant in Hernando County, Florida. Defendant Joann Rash was served with the Plaintiff's petition for dissolution of marriage on March 14, 1994 in New Jersey.

On March 21, 1994, Joann Rash filed suit for dissolution of marriage in Cape May County, New Jersey. On March 31, 1994, the New Jersey court entered a Temporary Injunction restraining Plaintiff Joseph Rash from proceeding in personam against Joann Rash in the Florida action and from proceeding to obtain relief on any issues regarding equitable distribution of personal and real property, attorney's fees, costs, suit money, and the parties' marital debt. Defendant Joann Rash alleges that both parties were represented by counsel at the New Jersey hearing on the Temporary Injunction.

Defendant further alleges that counsel for Plaintiff Joseph Rash filed a Motion to Proceed in the Florida action on July 8, 1994, which the Florida court granted. On December 14, 1994, the New Jersey court revisited the issue of in personam jurisdiction and again found that the State of

Appendix B

Florida inappropriately asserted in personam jurisdiction over Joann Rash. In its order, the New Jersey court stated that the State of New Jersey had sole in personam jurisdiction over both parties and that it was the proper forum for resolving issues relating to distribution of property and support. Nevertheless, on October 21, 1994, the Fifth Judicial Circuit, Hernando County, Florida, entered a Final Judgment of Dissolution of Marriage in the Florida proceeding. In the New Jersey action, a Final Judgment of Divorce was entered in the Chancery Division of the Superior Court of New Jersey, Cape May County on June 19, 1995.

Pursuant to the Florida judgment, the court awarded Joseph Rash the "sole and exclusive ownership of his individual Pennsylvania Public School Employees' Retirement System pension," excluding Joann Rash from any benefit thereof. The Florida court also determined that Joann Rash would not be entitled to any form of support from Joseph Rash, whether it be temporary, permanent, periodic, and/or lump sum alimony. Furthermore, the former marital home in Del Haven, New Jersey was to be divided equally between the parties. The Florida judgment also directed that each party retain "sole and exclusive possession and ownership of any and all accounts, personal property and real property in their individual names," including any insurance policies owned by the parties.

On the other hand, the New Jersey court awarded Joann Rash fifty percent (50%) of Joseph Rash's retirement pension in addition to one-half of any increases in the future. The former wife was also granted fifty percent (50%) of Joseph Rash's Social Security monthly benefit, as well as one-half

of any increases in the future. Additionally, the New Jersey court awarded Joann Rash permanent alimony at $25.00 per week. Pursuant to its decree, the New Jersey court also directed that the funds from the sale of the marital home be divided equally, with Joseph Rash's portion subject to certain credits and debits. Joseph Rash received the property located in Spring Hill, Florida, subject to a credit of $500 in favor of Joann Rash. The New Jersey court also ordered that any insurance policies owned by the parties be equally divided.

On March 18, 1996, the New Jersey court entered a Domestic Relations Order. The order requires that the Administrator of the Plaintiff's pension pay fifty percent (50%) of Joseph Rash's monthly benefit to Joann Rash. Subsequently, the Plaintiff was notified by letter that one-half of his monthly benefit would be deducted and directed to the Defendant.

DISCUSSION

Plaintiff Joseph Rash argues that the Florida divorce decree, granted prior to the New Jersey judgment of divorce, is entitled to full faith and credit in New Jersey. Plaintiff contends that once the Defendant was properly served with the complaint in the Florida action, Florida's long-arm statute provided personal and subject matter jurisdiction in the Florida court. Accordingly, Plaintiff asserts that the New Jersey court was bound by the Florida judgment.

Defendant Joann Rash contends that the Florida judgment was unenforceable because the court lacked in personam jurisdiction over her in the Florida action.

Defendant argues that the temporary injunction granted by the New Jersey court, restraining Plaintiff Joseph Rash from proceeding with the Florida suit (albeit ineffectively), invalidates the Florida judgment.

Article IV, section 1 of the U.S. Constitution provides that:

> Full faith and credit shall be given in each State to the public acts, records, and judicial proceeding of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be provided, and the effect thereof.

Furthermore, 28 U.S.C. § 1738 provides in pertinent part:

> Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Accordingly, the full faith and credit clause of the Constitution and 28 U.S.C. § 1738 generally require a state court to give effect to a sister state court's judgment. *Fehlhaber v. Fehlhaber*, 669 F.2d 990, 994 (5th Cir. 1982). However, a prior court's judgment may not take effect if the original court lacked personal or subject matter jurisdiction over the action. *Id.* Specifically, a judgment of divorce

granted in one state should be valid in all other states "as long as the jurisdictional facts, including domicile, are validly established whenever the decree is questioned." *Holm v. Shilensky*, 388 F.2d 54, 56 (2d Cir. 1968).

Here, the jurisdictional facts are not validly established. The New Jersey court found that the Florida court lacked in personam jurisdiction over the Defendant Joann Rash and thus entered a temporary injunction proscribing Plaintiff Joseph Rash from further proceeding with the Florida divorce action. Both parties were represented by counsel at the New Jersey hearing on the temporary injunction and thus were afforded an opportunity at that time to present their arguments. The New Jersey court determined that it had sole in personam jurisdiction over both parties and therefore was the appropriate forum in which to litigate the issues.

The Full Faith and Credit clause does not operate in this case to enforce the Florida judgment because the Florida court did not have personal jurisdiction over the Defendant Joann Rash. Consequently, the Florida court could not adjudicate alimony and property rights between the parties and therefore the Florida judgment was not res judicata on these issues in the New Jersey action. *See Binger v. Binger*, 555 So.2d 373 (Fla. 1st DCA 1989), citing *Pawley v. Pawley*, 46 So.2d 464 (Fla. 1950).

Defendant Joann Rash moves to dismiss Plaintiff's Complaint for Declaratory Judgment and Permanent Injunction filed in this Court for lack of subject matter jurisdiction. Defendant contends that because the issues in

this action have already been litigated in the State of New Jersey, this Court lacks jurisdiction.

Federal courts are courts of limited jurisdiction, and the basis of such jurisdiction must be affirmatively shown. *Kirkland Masonry, Inc. v. C.I.R.*, 614 F.2d 532, 533 (5th Cir. 1980). While the diversity statute, 28 U.S.C. § 1332, may confer jurisdiction on federal district courts where there is diversity of citizenship and a sufficient amount in controversy, there is an exception regarding divorce proceedings. *Lutsky v. Lutsky*, 310 F. Supp. 517, affirmed 433 F.2d 346 (5th Cir. 1970). Federal courts usually decline review of domestic relations cases because state courts traditionally have jurisdiction over such cases. *Reyher v. Equitable Life Assur. Soc. of U.S.*, 900 F. Supp. 428, 431-32 (M.D. Fla. 1995), citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979).

This Court finds that Plaintiff Joseph Rash has failed to affirmatively establish a basis for subject matter jurisdiction in this action. Furthermore, the issues involved in this case emanate from the original divorce proceedings; therefore, the state courts should retain jurisdiction. Because this action must be dismissed for lack of subject matter jurisdiction, this Court finds it unnecessary to address Plaintiff's other grounds for dismissal. Accordingly, it is

ORDERED that the Defendant Joann Rash's Motion to Dismiss Complaint for Declaratory Judgment and Permanent Injunction be **granted** (Dkt. 5). The Clerk of Court shall enter a final judgment of dismissal.

DONE and ORDERED in Chambers, in Tampa, Florida, this 26th day of March, 1997.

s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 27, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-2531

JOSEPH J. RASH,

Plaintiff-Appellant,

versus

JOANN H. RASH,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: BARKETT, Circuit Judge, and GODBOLD and GOODWIN*, Senior Circuit Judges.

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* Honorable Alfred T. Goodwin, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
SENIOR UNITED STATES CIRCUIT JUDGE